Delta Haulage Transport (M) Sdn Bhd & Anor v Shanmugam Ramasamy & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)(NCvC)-198–01 OF 2021
HAS ZANAH MEHAT, SEE MEE CHUN AND HASHIM HAMZAH JJCA
2 AUGUST 2023

Civil Procedure — Appeal — Appeal against High Court's decision — Appellants and first respondent was found jointly and severally liable to second respondent — Appellants filed for notice of contribution or indemnity against first respondent — High Court dismissed application — Whether res judicata had set in — Whether s 10 of Civil Law Act 1956 could be invoked

This was an appeal by the appellants ('D1' and 'D3') against the decision of the High Court ('HC') in dismissing their application for an order by way of contribution or by way of indemnity against the first respondent ('D2'). The second respondent ('plaintiff') was a company which dealt in the production of room air-conditioners and component parts. D1 was a logistics company handling the transportation of freight and cargo. D3, D4 and D5 were directors of D1 while D2 was an employee of the plaintiff. The plaintiff had filed an action for fraud against the defendants for, inter alia, a relief for the payment of RM9,011,470 from all the defendants. D2 filed his defence against the plaintiff's claim and also filed a notice of contribution against D1, D3, D4 and D5. D1, D3, D4 and D5 filed their defence against the plaintiff's claim, and D1 also had a counterclaim. D1, D3, D4 and D5 filed their defence against D2's notice of contribution and D1 also had a counterclaim against D2. After a full trial, the HC allowed the plaintiff's claim against D1, D3, D4 and D5 and dismissed the claim against D2. D1's counterclaims against the plaintiff was allowed while against D2 was dismissed. The HC entered judgment against D1, D3, D4 and D5 and ordered a sum of RM9,011,470 to be jointly and severally paid to the plaintiff. D1, D3, D4 and D5 filed their appeal to the Court of Appeal through Appeal 994 while the plaintiff through Appeal 995. The Court of Appeal dismissed the appeal of D1, D3, D4 and D5 and allowed the plaintiff's appeal against D2. D1, D3 and D4 subsequently filed the notice of contribution or indemnity against D2 but the application was dismissed. Hence this appeal by D1 and D3.

Held, dismissing the appeal:

(1) When the Court of Appeal found D2 liable, it followed the liability had to be attached to the High Court order and to the statement of claim. It

would be unjust and oppressive to D2 and even to the plaintiff for the matter to be re-litigated and where all issues on liability and contribution had been determined earlier. D1 and D3 could have raised the issue of contribution at the Court of Appeal then, when Appeal 994 was dismissed and Appeal 995 was allowed. The effect of the notice of contribution would be contrary to the High Court order which had earlier found the defendants to be jointly and severally liable to the plaintiff and also by the Court of Appeal in Appeal 994 and Appeal 995. The contention that it was not a re-litigation of issues as D1 and D3 would be relying on the evidence already produced, would run afoul of res judicata, and brought about prejudice to, D2 in particular, when the issues on liability and contribution had been determined earlier. Res judicata had already set in, either that D1 and D3 were attempting to set aside the order of the High Court and revisit the orders of the Court of Appeal which had found all defendants to be jointly and severally liable to the plaintiff; and res judicata in those issues of liability and contribution had been determined at the High Court earlier. The factual matrix of this case was such that it precluded the operation and invocation of s 10 of the Civil Law Act 1956 (see paras 33, 40–41 & 43–44).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu ('D1' dan 'D3') terhadap keputusan Mahkamah Tinggi ('MT') yang menolak permohonan mereka untuk mendapatkan perintah sumbangan atau indemniti terhadap responden pertama ('D2'). Responden kedua ('plaintif') adalah sebuah syarikat yang berurusan dalam pengeluaran penghawa dingin bilik dan bahagian komponen. D1 ialah sebuah syarikat logistik yang mengendalikan pengangkutan barang dan kargo. D3, D4 dan D5 adalah pengarah D1 manakala D2 adalah pekerja plaintif. Plaintif telah memfailkan tindakan penipuan terhadap defendan untuk, antara lain, pelepasan untuk pembayaran RM9,011,470 daripada semua defendan. D2 memfailkan pembelaannya terhadap tuntutan plaintif dan juga memfailkan notis sumbangan terhadap D1, D3, D4 dan D5. D1, D3, D4 dan D5 memfailkan pembelaan mereka terhadap tuntutan plaintif, dan D1 juga mempunyai tuntutan balas. D1, D3, D4 dan D5 memfailkan pembelaan mereka terhadap notis sumbangan D2 dan D1 juga mempunyai tuntutan balas terhadap D2. Selepas perbicaraan penuh, MT membenarkan tuntutan plaintif terhadap D1, D3, D4 dan D5 dan menolak tuntutan terhadap D2. Tuntutan balas D1 terhadap plaintif dibenarkan manakala terhadap D2 telah ditolak. MT membuat penghakiman terhadap D1, D3, D4 dan D5 dan memerintahkan sejumlah RM9,011,470 dibayar secara bersama dan berasingan kepada plaintif. D1, D3, D4 dan D5 memfailkan rayuan mereka kepada Mahkamah Rayuan melalui Rayuan 994 manakala plaintif melalui Rayuan 995. Mahkamah Rayuan menolak rayuan D1, D3, D4 dan D5 dan membenarkan rayuan plaintif terhadap D2. D1, D3 dan D4 kemudiannya memfailkan notis sumbangan atau indemniti terhadap D2 tetapi permohonan

itu ditolak. Oleh itu rayuan ini oleh D1 dan D3. A

Diputuskan, menolak rayuan:

(1) Apabila Mahkamah Rayuan mendapati D2 bertanggungjawab, ia berikutan liabiliti itu perlu dilampirkan pada perintah Mahkamah Tinggi dan kepada pernyataan tuntutan. Adalah tidak adil dan menindas kepada D2 dan juga kepada plaintif untuk perkara itu dibicarakan semula dan di mana semua isu mengenai liabiliti dan sumbangan telah ditentukan lebih awal. D1 dan D3 boleh membangkitkan isu sumbangan di Mahkamah Rayuan dahulu, apabila Rayuan 994 ditolak dan Rayuan 995 dibenarkan. Kesan daripada notis sumbangan itu akan bertentangan dengan perintah Mahkamah Tinggi yang sebelum ini mendapati defendan bertanggungjawab secara bersama dan berasingan kepada plaintif dan juga oleh Mahkamah Rayuan dalam Rayuan 994 dan Rayuan 995. Pertikaian bahawa ia bukan litigasi semula isu kerana D1 dan D3 akan bergantung kepada keterangan yang telah dikemukakan, akan bercanggah dengan res judicata, dan membawa prejudis kepada, D2 khususnya, apabila isu mengenai liabiliti dan sumbangan telah ditentukan lebih awal. Res judicata telah pun bermula, sama ada D1 dan D3 cuba mengetepikan perintah Mahkamah Tinggi dan menyemak semula perintah Mahkamah Rayuan yang mendapati semua defendan bertanggungjawab secara bersama dan berasingan kepada plaintif; dan res judicata dalam isu liabiliti dan sumbangan telah ditentukan di Mahkamah Tinggi sebelum ini. Matriks fakta kes ini adalah sedemikian rupa sehingga menghalang operasi dan penggunaan s 10 Akta Undang-Undang Sivil 1956 (lihat perenggan 33, 40–41 & 43–44).] B C D E F

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd) G

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Burke v LFOT Pty Ltd (2002) 209 CLR 282, HC (refd)

Dr Aishah Tul Radziah bt L Hussin v Dr Suresh a/l Kumarasamy & Ors [2014] 11 MLJ 702; [2015] 10 CLJ 222, HC (refd) H

Harper v Gray & Walker (a firm) and others [1985] 2 All ER 507, QBD (refd)

Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors [2000] 4 MLJ 200, HC (refd)

Legislation referred to I

Civil Law Act 1956 s 10, 10(1), (2)

Rules of Court 2012 O 92 r 4

Appeal from: *Panasonic Appliances Air-Conditioning Malaysia Sdn Bhd v Delta*

A *Haulage Transport (M) Sdn Bhd & Ors* [2021] MLJU 2503 (High Court, Shah Alam)

Kuldeep Kumar (with Athari Bahardin) (J Kuldeep Kumar & Co) for the appellant.

B *Hasshahari bin Johari Mawi (Hasshahari & Partners) for the first respondent.*

Romesh Abraham (with Gavinesh Siva Dharma) (Shook Lin & Bok) for the second respondent.

See Mee Chun JCA (delivering judgment of the court):

C

INTRODUCTION

[1] This is an appeal by the appellants who were D1 and D3 in the High Court ('HC') against the decision of the HC to dismiss their application for an D order by way of contribution or by way of indemnity against the first respondent who was D2 in the HC.

[2] The application was dismissed in the HC and the appeal before us was likewise dismissed. E

[3] For the purpose of this appeal, parties will be referred to as in the HC.

PARTIES

F

[4] The plaintiff is a company which deals in the production of room air-conditioners and component parts.

[5] D1 is a logistics company handling the transportation of freight and G cargo. D3, D4 and D5 are directors of D1. D2 has been an employee of the plaintiff since 1995 and was its General Manager in the Material Management Department in May 2012 until June 2014.

BACKGROUND FACTS

H

The claim

[6] It all began when the plaintiff had filed an action for fraud on 10 March 2016 against the defendants for, inter alia, a relief for the payment of I RM9,011,470 from all the defendants.

[7] D2 filed his defence against the plaintiff's claim on 5 May 2016. D2 also filed a notice of contribution dated 9 May 2016 against D1, D3, D4 and D5.

[8] On 17 May 2016, D1, D3, D4 and D5 filed their defence against the plaintiff's claim, and D1 also had a counterclaim.

[9] On 18 July 2016, D1, D3, D4 and D5 filed their defence against D2's notice of contribution. D1 also had a counterclaim against D2.

[10] On 14 April 2017 after a full trial, the HC allowed the plaintiff's claim against D1, D3, D4 and D5 and dismissed the claim against D2. The counterclaim by D1 against the plaintiff was allowed. D1's counterclaim against D2 was dismissed. The HC entered judgment against D1, D3, D4 and D5 and ordered a sum of RM9,011,470 to be jointly and severally paid to the plaintiff.

The appeal

[11] D1, D3, D4 and D5 filed their appeal to the Court of Appeal ('Appeal 994'). Likewise, the plaintiff ('Appeal 995').

[12] On 5 August 2019, the Court of Appeal dismissed the appeal of D1, D3, D4 and D5 and allowed the plaintiff's appeal against D2.

[13] There was no application for leave to appeal to the Federal Court by any party.

The notice of application for contribution or indemnity

[14] On 25 October 2019, D1, D3 and D4 filed the notice of contribution or indemnity in encl 217 against D2. The application was dismissed and D1 and D3 have filed this present appeal.

Decision of the HC

[15] The grounds of judgment of the HC is to be found in encl 4/25–37.

[16] In paras 19–21, the HC had set down the factual background of the case which we think useful to our appreciation of the appeal. At p 28 this was said:

> [19] In 2011 the second defendant represented to the first defendant that the plaintiff had substantial unaccounted sums of money for which the plaintiff could not reconcile. The second defendant represented to the first defendant that the plaintiff had been advised by its accountants to reconcile the irregularity by means of transferring the said excess funds in stages by way of third party payments to religious and charitable organisations. To facilitate the said transfer, the second defendant sought the assistance of the first defendant to issue invoices in support of the transfer of funds.

A [20] The first defendant believed the false representations made by the second defendant and thereby proceeded to periodically issue invoices for 16 haulage services to the plaintiff amounting to RM9,011,470.

[21] The first defendant subsequently harbored doubts over the scheme and went to the plaintiff's senior officers and informed them of what had transpired. An B investigation was carried out. To cut the story short, this civil suit was filed to recover the amounts siphoned off.

[17] The HC found that D1 and D3 could not invoke s 10 of the Civil Law Act 1956 as the process would involve the re-litigation of issues that had already C been decided in the trial held earlier. At paras 36 and 37 the HC said:

[36] In this case the first, third and fourth defendants are seeking contribution against a co-defendant, the second defendant. A full trial had been undertaken between all the defendants and the plaintiff. This present case is not a case whereby D the three defendants are seeking contribution against a third party, who was not already a party to the action, upon being found liable by the Court of Appeal.

[37] At the trial earlier, all issues of liability between the parties had been conclusively determined as between the plaintiff and the first, third, fourth and fifth defendants and a judgement was handed down on 14 April 2017. This judgment E was upheld and affirmed by the Court of Appeal on 5 August 2019 after having heard the submissions of parties. Hence all issues with regard to the second defendant have been conclusively determined between the plaintiff and the second defendant.

F **[18]** The HC in para 27 also viewed that res judicata was applicable as per *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393.

G **[19]** The HC noted that D1 had not seen it fit to file a counterclaim against D2. The HC noted that counsels for the other defendants had cross examined D2 at length on every aspect of the claim and therefore the issue had been raised and considered at trial.

H **[20]** The issue of contribution could have been raised immediately after Appeal 995 was allowed and judgement entered against D2. The explanation that the appeal did not involve D1 and D3 was not tenable as both Appeal 994 and Appeal 995 were heard together. The Court of Appeal then was the correct forum to pursue the contribution.

I **[21]** Apart from being res judicata, it would be prejudicial and unjust for D1 and D3 to re-litigate the issues when they had already elected to do so at the trial.

OUR DECISION

[22] We do not intend to set out the respective submissions of parties separately but will address them in the course of the decision.

[23] For the purpose of this appeal, the remaining parties are D1 and D3 as the appellants, D2 as the first respondent and the plaintiff as the second respondent.

[24] We start by referring to the notice of application for contribution dated 25 October 2019 (encl 4/44–47). That notice is made pursuant to s 10 of the Civil Law Act 1956 ('the CLA'), O 92 r 4 of the Rules of Court 2012 and/or the inherent jurisdiction of the court. It seeks, inter alia, for an order that:

(a) The 2nd Defendant do forthwith pay to the 1st, 3rd, 4th and 5th Defendant by way of contribution of 100% or by way of indemnity all the sum ordered against the 1st, 3rd, 4th and 5th Defendants jointly and severally with the 2nd Defendant by the Court of Appeal Order dated 5.8.2019;

[25] The grounds in support of the application are presented as below:

(a) The 2nd Defendant had represented to the 1st Defendant amongst others, that the Plaintiff had substantial unaccounted amount in the Plaintiff's account. Due to that, the Plaintiff sought the assistance of several parties including the 1st Defendant to issue invoices to justify the transfer of funds from the Plaintiff's account to the accounts of 3rd parties for religious and charitable purposes ('Arrangement');

(b) In reliance to the representations made by the 2nd Defendant as an agent of the Plaintiff, the 1st Defendant agreed to assist the Plaintiff in the implementation of the said Arrangement. Between 2011 and May 2014, the 1st Defendant had issued 568 invoices for haulage services amounting to RM9,011,470.00 to the Plaintiff;

(c) The 2nd Defendant also represented to the 1st Defendant that the 1st Defendant will be fully indemnified of all tax and/or any other form of liabilities arising from the implementation of the said Arrangement. For this purpose, the 1st Defendant could retain 10% of the sum received pursuant to the implementation of the said Arrangement;

(d) The 1st Defendant took the initiative to alert the Plaintiffs higher officers when it sensed something wrong in the implementation of the said Arrangement i.e. 2nd Defendant instructed payments to be made to some companies and/or individuals and cash payments to be made to him;

(e) Following that, the officers of PricewaterhouseCooper Services (M) Sdn Bhd ('PwC') appointed by the Plaintiff approached the 1st Defendant for cooperation and clarification on the said Arrangement. The 1st Defendant

and 3rd Defendant had handed over all documents pertaining to the said Arrangement to the officers of PwC for their further investigation;

(f) Based on the said Arrangement and the instructions of the 2nd Defendant, the 1st Defendant transferred a total sum of RM8,927,556.50 to the 2nd Defendant and/or other 3rd parties;

(g) The 1st Defendant retained a sum of RM83,913.50 which is approximately 1% of the total sum received from the Plaintiff ie RM9,011,470.00; and

(h) In that circumstances, the 2nd Defendant ought to have contributed and/or indemnified all of the said sums ordered against the 1st, 3rd, 4th, and 5th Defendants jointly and severally with the 2nd Defendant by the Court of Appeal Order dated 5.8.2019.

[26] Section 10(1) and (2) of the CLA provides as follows:

10 Proceedings against, and contribution between, joint and several tortfeasors

(1) Where damage is suffered by any person as a result of a tort (whether a crime or not) —

(a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage;

(b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child, of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the Court is of opinion that there was reasonable ground for bringing the action;

(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

(2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage, and the Court shall have power to

exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

[27] The very pertinent provision would be s 10(2) where it provides that in any proceedings for contribution, the amount recoverable from any such person, in this case, D2, shall be such as may be just and equitable, having regard to the extent of that person's responsibility for the damage.

[28] We do not have an issue with s 10(2) of the CLA and how it is to apply. However, we are of the considered opinion that the provision cannot be invoked when such proceedings for contribution involves the re-litigation of issues that had already been decided by the court earlier.

[29] As may be recalled, the plaintiff had in its claim in prayer 45(4)(a) sought the relief as follows:

(4) As against all Defendants jointly and severally:-

(a) Judgment for the plaintiff for payment of the sum of RM9,011,470;

[30] Following from that, the trial had commenced between the plaintiff, and the defendants. This was not an instance where D1 and D3 are now seeking contribution from a third party who was not already a party but subsequently found liable at the Court of Appeal. All issues of liability had in fact been conclusively determined between the plaintiff and D1 and D3 by the High Court judgment and affirmed by the Court of Appeal. Likewise, all issues between the plaintiff and D2 was determined by the judgment and order of the Court of Appeal.

[31] We refer to the High Court order dated 14 April 2017 (encl 5/121–123) and the relevant paragraphs as follows:

... IT IS HEREBY ADJUDGED that:-

(a) judgment be entered against the 1st Defendant, the 3rd Defendant, the 4th Defendant and the 5th Defendant jointly and severally to pay the Plaintiff:

(i) the sum of RM9,011,470.00 ('Judgment Sum');

(ii) interest at the rate of 5% per annum on RM9,011,470.00 from 10 March 2016 until full payment of the Judgment Sum; and

(iii) cost of RM50,000.00;

(b) the 1st Defendant's Counterclaim against the Plaintiff in the sum of RM243,484.00 be allowed and set off against the Judgment Sum; and

(c) the Plaintiff's action against the 2nd Defendant be dismissed with costs of RM20,000.00.

[32] The Court of Appeal orders dated 5 August 2019 can be found in encl 5/105–106 for Appeal 994, and encl 5/114–115 for Appeal 995. We reproduce the relevant part of the order for Appeal 995 as follows:

... IT IS HEREBY UNANIMOUSLY ORDERED that:

(a) the Appellant's appeal is allowed with costs of RM30,000.00 subject to allocatur fee;

(b) the High Court Judgment dated 14 April 2017 dismissing the Appellant's claim against the Respondent be set aside;

(c) judgment be entered against the Respondent to pay the Appellant:-

(i) the sum of RM9,011,470.00 ('Judgment Sum') and

(ii) interest at the rate of 5% per annum of RM9,011,470.00 from 10 March 2016 until full payment of the Judgment Sum.

[33] When the Court of Appeal found D2 liable, it follows the liability has to be attached to the High Court order dated 14 April 2017 and to the statement of claim, in particular para 45(4)(a) for the plaintiff's prayer that 'As against all Defendants jointly and severally, judgment for the plaintiff for the sum of RM9,011,470.00'. D2 was in the picture all along where the issues of liability had been determined in the HC and subsequently in the Court of Appeal.

[34] D2 in turn had filed a notice of contribution dated 9 May 2016 against D1 and D3. This notice can be found in encl 6/126–129. The HC had this to say in paras 39 and 40 of the GOJ (encl 4/34):

[39] The trial earlier had heard and considered the issue of liability, indemnity and contribution of the second defendant and had made its decision. It would be unjust to allow the first, third and fourth defendants to again go through another round of litigation to decide on the apportionment to be attributed to the second defendant.

[40] It is significant to point out that the first defendant did not see it fit to file a counterclaim against the second defendant at the earlier trial to seek contribution. Having perused the notes of evidence in this case I noted that counsels for the other defendants had cross-examined the second defendant very thoroughly and at length on every aspect of the subject of the claim. In this matter I fully agree with the contention by counsel for plaintiff that the matter is res judicata as it is an issue that has been raised and considered at the trial.

[35] We find that the HC was not correct to say that D1 had not filed a counterclaim against D2. D1 indeed had a counterclaim against D2, as can be seen in encl 6/212–217. However, this does not detract from the fact of the context of D1's counterclaim against D2 and the notice of contribution filed by

D2 against D1 and D3 that the HC said that the issue of liability, indemnity and contribution had been heard and considered at the trial.

[36] The HC had referred to *Badiaddin* in para 27 of the GOJ that there was res judicata as follows:

> (3) (Per Peh Swee Chin FCJ) The doctrine of res judicata would apply in this case and bar the making of the third order directly concerned, because the said previous order had become the truth between the landowners and the chargee, and the order directly concerned would constitute a challenge to the truth or accuracy of the said previous order. Although the doctrine was not expressly argued or expressly relied on by the courts below, the High Court could still exercise its inherent jurisdiction by relying on the said doctrine even though it was not pleaded by any of the parties (see p 417A-C).
>
> (4) (Per Peh Swee Chin FCJ) When a judgment in the High Court has been perfected, a party to the judgment generally, apart from any appeal, cannot reopen the matter finalized in the judgment by seeking to alter it or amend it for the court would be functus officio by virtue of the ratio of *Hock Hua Bank v Sahari bin Murid*. Once perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior court of unlimited civil jurisdiction in the course of contentious litigation. It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside on valid grounds, but without doing so, one cannot attack its invalidity laterally by raising an objection to its invalidity in any other proceedings, without filing proceedings for applying to have it set aside first. When one wishes to file such proceedings to set it aside, one must do so within the same proceedings or action in which the same order was obtained and not in a separate fresh proceeding or new action on any ground other than those mentioned in the quoted passage from *Hock Hua Bank v Sahari bin Murid* (see pp 417G-I and 418A-B); *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 followed.

[37] We agree this refers to res judicata in the sense of barring a party from applying to set aside an order of another court of concurrent jurisdiction. This is in fact what is asked by D1 and D3 when the High Court had earlier found all defendants to be jointly and severally liable to the plaintiff and also by the Court of Appeal in Appeal 994 and Appeal 995.

[38] It may well be said that res judicata applies in another sense as recognised in the oft quoted case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 where we say that the issue of contribution had been raised in the earlier trial. At pp 197–198 and 200, the following was said:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and

A their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur.* The public policy of the law is that, it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium.* It is only just that no one ought to be vexed
B twice for the same cause of action — *nemo debet bis vexari pro eadem causa.* Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy.

...

C The starting point ought to be the celebrated passage by Wigram VC in the case of *Henderson v Henderson* (1843) 3 Hare 100 at p 115 which is:

> The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might
D have brought forward at the time.
>
> ...

There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and *not* to issues which might have
E been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of res judicata, ie doctrine of estoppel *per rem judicatum.*

F We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of res judicata, in other words, with the doctrine of estoppel *per rem judicatum.* It is particularly important
G to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

H **[39]** We further refer to the case of *Dr Aishah Tul Radziah bt L Hussin v Dr Suresh a/l Kumarasamy & Ors* [2014] 11 MLJ 702; [2015] 10 CLJ 222 where the plaintiff was sued by her patient and held liable by the court. Subsequently the plaintiff filed an action for contribution against the defendants who were
I doctors in Hospital Pulau Pinang (HPP) who had earlier treated the patient. This was said by the high court at p 726 (MLJ); p 244 (CLJ):

> [76] ... In the result, I am impelled to the view that everything that is being articulated against HPP and its doctors in the present suit could have been done in the first suit.

[77] In my view, in the circumstances of the situation which prevailed in the first suit and in particular having regard to Dr Aishah's trial strategy of shifting the blame to HPP and its doctors, it was incumbent upon Dr Aishah to ensure that HPP and its doctors were added as third parties or co-defendants in the first suit. Also, since they had participated as witnesses and had their competence challenged and a finding had been made by the sessions court that they were not liable for any negligence (which had been upheld by the High Court), there must be finality to litigation. As such, it would be unjust and oppressive in the extreme to allow Dr Aishah to drag HPP and its doctors through another round of litigation and for the issue to be relitigated.

THE OUTCOME

[78] In the circumstances, and for the reasons as stated above, I am impelled to the view that notwithstanding that HPP and its doctors were neither parties nor privies to the first suit, the facts and circumstances of this case are such that they had participated in the first suit and a ruling on the issue of liability had been made in their favour and as such, a fresh suit against them based on essentially the same issue constitutes an abuse of process and the plea of res judicata (issue estoppel) therefore succeeds. The defendants' application by way of encl 12 must therefore be allowed.

[40] Similar to our case it would be unjust and oppressive to D2 and even to the plaintiff for the matter to be re-relitigated and where all issues on liability and contribution had been determined earlier. This is quite apart from the principle of res judicata.

[41] We further find that D1 and D3 could have raised the issue of contribution at the Court of Appeal then, when Appeal 994 was dismissed and Appeal 995 was allowed. We agree with the HC in para 43 of the GOJ (encl 4/34) that:

[43] I also found it quite perplexing that the first, third and fourth defendants did not pursue the issue of contribution at the appeal at the Court of Appeal immediately after the appeal was allowed and judgment was pronounced against the second defendant. When asked to clarify counsel for the first and third defendant explained that the Appeal No 995 was an appeal by the plaintiff against the second defendant and thus did not involve them at all. This court could not agree with counsel's reasoning and found it untenable and without merit. Both the 994 and 995 appeals were heard and disposed of in the Court of Appeal simultaneously. The first and third defendants did not deem it to pursue the matter of indemnity and contribution before the Court of Appeal. That, in my view was the appropriate forum to seek the court's ruling and directions on contribution on the part of the second defendant. The correct forum and moment to pursue the contribution and/or indemnity against the second defendant was at the Court of Appeal when judgment was entered against the second defendant. In declining to avail themselves of the opportunity to claim for contribution at the appeal the first and third defendants are now estopped from returning to this court to seek redress.

[42] It does not now lie on D1 and D3 to then subsequently file the notice of contribution and/or indemnity. It is immaterial that it was filed on 25 October 2019, soon after the Court of Appeal orders on 5 August 2019. They have missed the proverbial boat, as the issue had been litigated in the High Court and finally concluded in the Court of Appeal where that would have been the forum and time to raise it.

[43] At the outset, D1 and D3 stated they are not challenging or disputing the Court of Appeal order in Appeal 994 (which dismissed their appeal on liability) and Appeal 995 (which allowed the plaintiff's appeal on liability against D2). We find that the effect of the notice of contribution would be contrary to the High Court order which had earlier found the defendants to be jointly and severally liable to the plaintiff and also by the Court of Appeal in Appeal 994 and Appeal 995.

[44] The contention that it is not a re-litigation of issues as D1 and D3 will be relying on the evidence already produced, will run afoul of res judicata as earlier discussed, and brings about prejudice to, D2 in particular, when the issues on liability and contribution had been determined earlier.

[45] We turn now to the principal authorities relied on by D1 and D3. These were:

(a) *Harper v Gray & Walker (a firm) and others* [1985] 2 All ER 507, where it was held at p 510 that:

> In *Croston v Vaughan* [1937] 4 All ER 249, the Court of Appeal held that when a judge had given judgment against two defendants he had jurisdiction to entertain an application from one of them to apportion blame between them although there had been no previous proceedings between the defendants.
>
> ...
>
> In light of *Croston v Vaughan* it was open to the architects from the commencement of the action to apply at its conclusion for an apportionment of liability between themselves and the other defendants.

(b) *Burke v LFOT Pty Ltd* (2002) 209 CLR 282, where it was held at p 292 that:

> In general terms, the principle of equitable contribution requires that those who are jointly or severally liable in respect of the same loss or damage should contribute to the compensation payable in respect of that loss or damage, either equally where they are liable in the same amount or proportionately, where the amount of their liability differs ...

(c) *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors* [2000] 4 MLJ 200, where it was held at p 287 that:

> When damage is caused as the result of torts committed by two or more tortfeasors, the tortfeasors may be jointly and severally liable for causing the same damage.
>
> ...
>
> For the first, Datu Sethu insists that this court must determine whether the tortuous acts of the defendants relate to the same damage or different damages. If they are for different damages then contribution cannot apply since s 10(1)(c) of the Civil Law Act 1956 confines to only the same damage ...
>
> From the evidence tendered, I am without doubt that all the defendants, except number six, nine and ten, are joint tortfeasors in causing the same damage to the plaintiffs. For this, contribution can be recovered from each other.
>
> As regards to the second issue raised, I note that throughout the hearing of this suit in respect of liability, each of the defendants who appeared had accused the other defendants (except when they are closely associated with each other, like the seventh and eights defendants, and the ninth and tenth defendants respectively) of negligence and/or nuisance. This was taken during cross-examination and submission. By this, I am satisfied that this constituted demands for contribution from each other under s 10(1)(c) of the Act.
>
> And by the powers conferred upon me under s 10(2) of the same Act ... I hereby announce the following apportionment of contribution after taking into consideration of the factors stated in this provision ...

[46] It was contended that *Harper* stood for the proposition that a claim for contribution may be brought at the conclusion of the action; *Burke* for the proposition that the same loss and damage can be ordered against evidence showing that D2 had benefitted the most; and *Steven Phoa* for the proposition that the HC ought to have assessed the extent of all the defendants' responsibility of the damage suffered by the plaintiff.

[47] Without even venturing into the merits of those propositions, we had earlier found that res judicata had already set in, either that D1 and D3 are attempting to set aside the order of the High Court and revisit the orders of the Court of Appeal which had found all defendants to be jointly and severally liable to the plaintiff; and res judicata in that issues of liability and contribution had been determined at the High Court earlier. The factual matrix of this case is such that it precludes the operation and invocation of s 10 of the CLA.

[48] We reiterate that when the Court of Appeal found D2 liable, it follows the liability has to be attached to the High Court order dated 14 April 2017 and

to the statement of claim, in particular para 45(4)(a) for the plaintiff's prayer that 'As against all Defendants jointly and severally, judgment for the plaintiff for the sum of RM9,011,470.00'.

CONCLUSION

[49] For the above reasons, we find that the HC had not erred in dismissing the application for contribution. We therefore dismissed the appeal with costs of RM5,000 each to D2 and the plaintiff, as the respondents, subject to allocatur.

Appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh